Filed 3/12/10 P. v. Guerrero CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL REYES GUERRERO,

Defendant and Appellant.

F056242

(Super. Ct. No. MF47039A)

O P I N I O N

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Carol K. Ash, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Wiseman, A.P.J., Hill, J., and Kane, J.

A jury convicted appellant Gabriel Reyes Guerrero of transportation of methamphetamine for purposes of sale (Health & Saf. Code, § 11379, subd. (b); count 1) and possession of methamphetamine for purposes of sale (Health & Saf. Code, § 11378; count 2). In addition, the jury found true enhancement allegations that in committing both offenses appellant was personally armed with a firearm (Pen. Code, § 12022, subd. (c)) The court imposed a prison term of nine years, consisting of the six-year middle term on count 1 plus the three-year lower term on the count 1 arming enhancement. On count 2, the court imposed, and stayed pursuant to Penal Code section 654,[1] the two-year lower term on the substantive offense and, it appears, a two-year lower term on the accompanying enhancement.[2] The court awarded appellant presentence credit of 235 days, consisting of 157 days of actual time credit and 78 days of conduct credit.

On appeal, appellant contends (1) he made, and the court erroneously denied, a motion to suppress evidence (§ 1538.5) and (2) the court violated appellant's constitutional rights to due process of law and trial by jury by instructing the jury with CALCRIM No. 416, regarding uncharged conspiracies. In addition, as we explain in part III of the Discussion section, we deem to be raised the contention that appellant is entitled to additional conduct credit. We will direct the court to correct a clerical error in the abstract of judgment--as discussed in part IV of the Discussion section--and otherwise affirm.

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[1] Except as otherwise indicated, all further statutory references are to the Penal Code.

[2] The court failed to specify whether it was imposing the lower, middle or upper term on the count 2 enhancement. It appears, however, that because the court imposed lower terms on both the count 1 enhancement and the count 2 substantive offense, it meant to impose a lower term on the count 2 enhancement as well, and that the court's failure to state on the record the length of the term on that enhancement was simply an oversight.

FACTUAL AND PROCEDURAL BACKGROUND

Facts[3]

On September 17, 2007, Officer Paul Llanez was present when a "confidential informant" (CI) spoke with someone by telephone, after which the CI told Officer Llanez that he (the CI) had spoken to "Gabriel," who had agreed to sell two pounds of methamphetamine for $26,000 and to bring the contraband to the Los Banos area on September 19 or 20, 2007.[4] The CI had previously provided information to Officer Llanez "pertaining to the sale of narcotics" and "that information prove[d] to be reliable." Officer Llanez had previously worked with the CI on more than 50 cases, and in more than 30 of those cases the CI had conducted controlled buys.

On September 19, 2007, the CI telephoned Officer Llanez and told the officer that Gabriel had contacted the CI and stated that he (Gabriel) was en route to Los Banos with the methamphetamine and would arrive at approximately 10:00 p.m. "At some point" thereafter he spoke with "the CI about what he saw when Gabriel arrived[.]" The CI told the officer the following: He met with two persons; "they showed him a lawnmower" in the back of a Ford F150 pickup; and there were "items wrapped in black plastic in the grass catcher area of the lawnmower." The CI also provided Officer Llanez with a partial license plate number of the pickup.

On cross-examination Officer Llanez testified he prepared a written report of his investigation in which he stated that the CI told him, inter alia, the following: The passenger of the pickup climbed into the back of the pickup and attempted to remove the grass catcher from the lawnmower. At "about that time, a slow moving vehicle passed

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3 Our factual statement is taken from the testimony adduced at the combined preliminary hearing/suppression motion hearing.

4 Except as otherwise indicated our factual statement is taken from Officer Llanez's direct examination testimony.

the parties," and the "subject attempting to remove the grass catcher from the lawnmower was suspicious."

Officer Llanez contacted Sergeant Elias Reyes of the Los Banos Police department, and asked the sergeant to contact the CI and effect a stop of the pickup.

Sergeant Reyes testified to the following: At approximately 8:30 p.m. on September 19, 2007, he received a call from Officer Llanez, who "put [Sergeant Reyes] in contact with" the CI. The CI told Sergeant Reyes that he (the CI) was "meeting with two Hispanic male adults" who "would be bringing methamphetamine" which "would be in the grass catcher of a lawnmower in the back of a pickup." The CI described the pickup as a green Ford F150 and provided Sergeant Reyes with a partial license plate number which contained the numbers 466.

Sergeant Reyes further testified to the following: Thereafter, in the City of Los Banos, Sergeant Reyes, in conjunction with other officers, effected a stop of a pickup meeting the description. The "subjects" were "detained." There was a lawnmower in the back of the pickup. A "drug K-9" was "called out to the scene," "a sniff of the vehicle [was] conducted," and "there [was] a positive alert by the K-9." Sergeant Reyes searched the lawnmower and found, inside of it, a large black plastic bag, inside of which was a gray plastic bag which contained "two large Glad Ziploc bags."

City of Los Banos Police Officer Raymond Reyna Jr. testified to the following: He assisted in the stop of the green Ford pickup. He searched the vehicle and found two handguns. One was under the rear seat and the other was under the driver's seat.

Officer Llanez testified he met with appellant and Martin Robles in Los Banos on the morning of the day following the stop of the green Ford pickup. Appellant told the officer he was in Los Banos for the purpose of "bringing 2 pounds of dope," which he had brought from San Diego and which he was going to sell for $26,000. Robles told the officer he was driving the pickup.

Officer Llanez observed the substance that had been found in the two "Ziploc clear-plastic bags" that had been "wrapped ... in a black plastic material ...." Based on his training and experience, the officer believed the substance to be methamphetamine. Office Llanez contacted a criminalist employed by the California Department of Justice. The criminalist informed the officer she performed chemical tests on the contents of each of the plastic bags and determined that each bag contained approximately one pound of methamphetamine.

Procedural Background

On November 26, 2007, Robles, appellant's co-defendant, filed a "Motion to Suppress Fruits of Illegal Stop and Detention (Penal Code § 1538.5)" and a supporting memorandum of points and authorities. (Unnecessary capitalization omitted.)

On January 24, 2008[5], at the outset of the combined preliminary hearing for both appellant and Robles, the prosecutor and Robles's counsel, Eric Schweitzer, confirmed that Robles's suppression motion was also before the court. Shortly thereafter, Paul Lyon, counsel for appellant, stated, "on behalf of Mr. Guerrero, we [are] joining in the motion to suppress."

The court proceeded to hear testimony, after which Mr. Schweitzer presented argument on his suppression motion. At that point, the following colloquy occurred:

> "MR. LYON: Your Honor, ... I would join in Mr. Schweitzer's argument --
>
> "MR. SLOCUM [prosecutor]: You Honor …, I need to impose because [Penal Code section 1538.5] requires Defense counsel to file written points and authorities. And Mr. Lyon cannot join orally in this motion. It's prohibited by law. [¶] ... [¶] 1538.5 specifically says he must file points and authorities ten days before --.

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5 Further references to dates of events are to dates in 2008.

"THE COURT: I didn't see if they'd been co-applicants or not. I guess it's Mr. Schweitzer's case, then.

"MR. SLOCUM: It is, your Honor. And Mr. Lyon can freely be heard on the preliminary hearing.

"MR. LYON: No. That's fine, your Honor. I'll withdraw my joinder in the motion and file one of my own.

"THE COURT: Well, that can be filed at a later date.

"MR. LYON: If that's sufficient and convenient for the parties involved.

"THE COURT: It'd be hard to argue that you're estopped from doing that. [i.e., filing a motion of his own at a later date.] If you want to participate further here, you can.

"MR. LYON: That's correct. And I also note that there appear to be other grounds in the 1538.5 that were disclosed in the officers' testimony. So, actually, it's to the benefit of the People to re-litigate the same issue. But I'll do that if that's what's required.

"THE COURT: Okay.

"MR. LYONS: There are other grounds, though."

Shortly thereafter, the court denied the suppression motion and held both defendants to answer on counts 1 and 2.

On February 20, Mr. Schweitzer, on behalf of Robles, filed a "... Renewed Penal Code § 1538.5 Motion. (Unnecessary capitalization omitted.)

On February 29, the court called the case of co-defendant Robles, noting that it was set for a readiness conference. The prosecutor added that also before the court was, inter alia, "1538.5 renewals ...." Shortly thereafter, Mr. Schweitzer argued the suppression motion, reiterating the points he made at the preliminary hearing; the prosecutor presented argument; and the court took the matter under submission. There was no appearance by appellant.

On March 13, by written decision, the court denied Robles's renewed suppression motion.

On May 13, Mr. Schweitzer filed on behalf of Robles a "Motion to Calendar and Order P.C. 1538.5 Hearing De Novo ...." (Unnecessary capitalization omitted.) Insofar as the record reveals, the court did not rule on this motion.

On August 18, during the joint trial of appellant and Robles, and out of the presence of the jury, Mr. Schweitzer told the court he wished to present a "new motion to suppress evidence in light of the newly discovered information about the confidential informant and his prior sworn testimony ...." Appellant's counsel, Mr. Lyon, stated, "We're joining in that motion also ...." After hearing argument from both counsel, the court denied the motion.

DISCUSSION

I. *Suppression Motion*

The record reveals four suppression motions: First, the one made by co-defendant Robles in late 2007 and heard and denied at the preliminary hearing on January 24; second, the one made by Robles on February 12 and denied by written ruling on March 12; third, the one made by Robles on May 13 but apparently never ruled upon; and fourth, the one made August 18, during trial.

Appellant states explicitly in his reply brief that he does not challenge the denial of the mid-trial motion, and he makes no mention of the third suppression motion. Rather, as best we can determine, appellant's contention that "the trial court erred when it denied the suppression motion" is directed as the first two suppression motions.

However, as to the second of these motions, the record shows that it was brought solely by appellant's co-defendant, and that appellant made no appearance at the hearing on the motion. Thus, appellant cannot claim error in the denial of that motion.

As to the first motion, although appellant initially stated he wished to join in Robles's motion, he later abandoned that position, telling the court he was "withdraw[ing] [his] joinder in the motion" and that he would "file one of [his] own."

Appellant disputes this interpretation of the record. His argument focuses on the following exchange:

> "MR. LYON: No. That's fine, your Honor. I'll withdraw my joinder in the motion and file one of my own.
>
> "THE COURT: Well, that can be filed at a later date.
>
> "MR. LYON: If that's sufficient and convenient for the parties involved.
>
> "THE COURT: It'd be hard to argue that you're estopped from doing that. *If you want to participate further here, you can.*" (Italics added.)

Appellant asserts that the foregoing, in particular the portion we have italicized, establishes that the court overruled the prosecution's objection to appellant joining in Robles's motion and stated that defense counsel Lyon could participate in the hearing on the suppression motion.

There are two problems with appellant's interpretation of the record. First, it is apparent that the court's statement that counsel could "participate further here," when considered in context, was a reference to participation *in the preliminary hearing* which was being conducted simultaneously with Robles's suppression motion. Immediately before the passage we have quoted above, the prosecutor stated that Mr. Lyon "[could] freely be heard on the preliminary hearing"; Mr. Lyon responded "That's fine"--i.e., it was "fine" with Mr. Lyon that he continue to participate in the preliminary hearing--and that he would "withdraw" his "joinder" and file his own suppression motion; and the court responded that appellant could not be estopped from doing "that", i.e., filing his own motion. When the court then stated appellant could "participate further here," it was echoing the prosecutor's earlier statement with regard to the preliminary hearing.

Second, and perhaps more fundamentally, regardless of whether the court correctly ruled that appellant could not join in the suppression motion, Mr. Lyon did not challenge this ruling. Rather, he reiterated his intention to "re-litigate" the issues relating to suppression of evidence by filing a motion of his own *at some later date*. And with the exception of the mid-trial suppression motion, the denial of which appellant does not challenge, appellant at no time either made a motion of his own or joined in a motion made by Robles. Thus, the record is devoid of any indication that appellant made a suppression motion, the denial of which he challenges on appeal.

Nevertheless, an appellate court may review the substance of a defendant's contention in order "[t]o forestall any ... charge of ineffective assistance of counsel. (*People v. Cox* (1991) 53 Cal.3d 618, 682.) We will therefore address the merits of appellant's suppression claim.

At the outset, we clarify what is not at issue. Appellant does not challenge the legality of the initial stop of the pickup, or the subsequent search of the vehicle which uncovered the methamphetamine and firearms, and hence he does not challenge the court's denial of the suppression motion as to *those items*. Rather, he argues that notwithstanding the lawful discovery of the contraband, his arrest was not lawful because he "was arrested without probable cause"; his statements to Officer Llanez the next day were the product of that unlawful arrest; and therefore the court erred in denying his motion to suppress the evidence of those statements. (*Wong Sun v. United States* (1963) 371 U.S. 471, 484-488.) Specifically, he argues the police did not have probable cause to arrest him because: "There are no facts from which the court could infer that appellant, who was simply a passenger and who did not say or do anything suspicious, even knew of or should have known of the presence of the ... firearm[s] under the driver's seat and back cab seat, or the presence and contents of the black plastic bag in the back part of the pickup." We disagree.

Appellant's argument turns on the validity of its major premise, i.e., that the police lacked probable cause to arrest him. The California Supreme Court has explained probable cause to arrest "exists when the facts known to the arresting officer 'would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person [arrested] is guilty of a crime.'" (*People v. Harris* (1975) 15 Cal.3d 384, 389.) "'[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts ....' [Citation.] It is incapable of precise definition. [Citation.] '"The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,"' and that belief must be 'particularized with respect to the person to be ... seized.' [Citation.]'" (*People v. Celis* (2004) 33 Cal.4th 667, 673.) "'[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.'" (*Maryland v. Garrison* (1987) 480 U.S. 79, 87.)

Evidence adduced at the January 24 hearing indicated that at the time of appellant's arrest, police were aware of the following: Drugs were secreted in plastic bags in the grass-catcher part of the lawnmower, which was located in the back of the pickup. The CI, whose reliability appellant does not challenge, told the police that prior to the stop of the pickup, the passenger in the vehicle climbed into the back and attempted to remove the grass catcher from the lawnmower, and that when a slow-moving vehicle passed by, the person trying to remove the grass catcher became "suspicious." Robles identified himself to police as driver, thereby indicating appellant was the passenger. Moreover, the CI also told police that when he met with the occupants of the pickup, "they," i.e., Robles *and* appellant, showed him the lawnmower.

The evidence and resulting inferences summarized above support the inference that, contrary to appellant's contention, appellant was not merely an innocent bystander with no knowledge of the contraband police found in the lawnmower. On this point, we find instructive *Maryland v. Pringle* (2003) 540 U.S. 366 (*Pringle*).

In that case, a police officer stopped a car; when the driver was retrieving his vehicle registration, the officer saw a large amount of rolled-up cash in the glove compartment directly in front of the defendant, a passenger in the front seat. (*Pringle*, *supra*, 540 U.S. at p. 368.) A third man was also in the car. The officer obtained the driver's consent to search the car and found five plastic baggies of cocaine behind the back-seat armrest and accessible to all three men. (*Ibid.*) When questioned, the three men failed to offer information regarding the ownership of the cocaine or the money. (*Id.* at pp. 368-369.) The officer then arrested all three occupants. (*Id.* at p. 369.) The United States Supreme Court held that it was "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus, a reasonable officer could conclude that there was probable cause to believe [the defendant] committed the crime of possession of cocaine, either solely or jointly." (*Id.* at p. 372.)

Pringle stands for the proposition that there is probable cause to arrest a passenger in a vehicle where there is evidence from which a reasonable officer may draw an inference that the passenger is jointly involved in criminal activity. Here, from the evidence that (1) the drugs were found in the grass-catcher area of the lawnmower, (2) both appellant and Robles directed the CI's attention to the lawnmower and (3) appellant attempted to remove the grass catcher from the lawnmower and became "suspicious" when a slow moving vehicle passed by, police, as "[persons] of ordinary care and prudence" could have "entertain[ed] an honest and strong suspicion" that appellant was engaged in knowingly transporting methamphetamine. (*People v. Harris*, supra, 15 Cal.3d at p. 389.) Therefore, there was probable cause to arrest appellant.

II. *CALCRIM No. 416*

Appellant argues the trial court erred by instructing with CALCRIM No. 416 regarding an uncharged conspiracy. He argues the instruction impermissibly directed the

jury to find that a conspiracy existed, thereby reducing the burden of proof and violating his constitutional rights to a jury trial and due process.[6]

The trial court provided the following instruction:

> "The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.
>
> "To prove that a defendant was a member of a conspiracy in this case, the People must prove that:
>
> "1. The defendant intended to agree and did agree with the other defendant to commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine;
>
> "2. At the time of the agreement, the defendant and the other alleged member of the conspiracy intended that one or more of them would commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine;
>
> "3. One of the defendants or both of them committed the following overt act to accomplish Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine: transporting methamphetamine from Southern California;
>
> "AND
>
> "4. This overt act was committed in California.
>
> "To decide whether a defendant committed this overt act, consider all of the evidence presented about the act[.]
>
> "To decide whether a defendant and the other alleged member of the conspiracy intended to commit Transportation of Methamphetamine for

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6 Appellant's co-defendant, in his appeal (*People v. Robles*, case No. F056181), made this argument. Appellant, pursuant to California Rules of Court, rule 8.200(a)(5), joins in that argument. We take judicial notice of Robles's opening brief in his appeal. (Evid. Code, §§ 452, subd. (d), 459.)

Sale and Possession for Sale of Methamphetamine, please refer to the separate instructions that I will give you on one or more of those crimes.

"The People must prove that the members of the alleged conspiracy had an agreement and intent to commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit one or more of those crimes. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

"An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

"The People contend that the defendants conspired to commit one of the following crimes: Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine. You may not find a defendant guilty under a conspiracy theory unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime he conspired to commit. You must also all agree on the degree of the crime.

"A member of a conspiracy does not have to personally know the identity or roles of all the other members.

"Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.

"Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy."

Appellant asserts that the first sentence of the instruction informed the jurors that "credible evidence of a conspiracy [w]as in fact presented to them[,]" thereby removing the issue from their consideration and leaving only the determination of whether defendant was a member of that conspiracy. Appellant says the jurors consequently

failed to decide whether evidence of a conspiracy had actually been presented to them, and necessarily concluded the fact of the conspiracy had been proven. He notes that the definition of a conspiracy, stated at the outset of analogous CALJIC No. 6.10.5, was not included in CALCRIM No. 416. He maintains that CALCRIM No. 416's description of the required elements was insufficient because those elements were "predicated on the premise that a conspiracy already exist[ed]" and the instruction never referred to an "alleged" conspiracy.

We disagree with appellant. The opening sentence of CALCRIM No. 416 acknowledged the existence of conspiracy *evidence*; it did not imply the prosecution had *met its burden* of proving the elements of a conspiracy beyond a reasonable doubt. Moreover, contrary to appellant's claim, the instruction frequently used the word "alleged" in describing the conspiracy and its members. This reinforced the notion that it was up to the jury to decide whether a conspiracy had been proven. Considering CALCRIM No. 416 in its entirety, we do not believe it removed an element from the jury's consideration.

Second, appellant complains that the instruction failed to inform the jury that the specific intent requirement is two-pronged—a specific intent *to agree to commit* the target offense and a specific intent *to commit* the offense. Appellant contends the instruction failed "to make clear the duality of the intent requirement." We do not see any omission or ambiguity in this regard. The instruction clearly stated the two separate intents required in the first two elements, as follows: "1. The defendant *intended to agree* and did agree with the other defendant to commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine;" and "2. At the time of the agreement the defendant and the other alleged member of the conspiracy *intended that one or more of them would commit* Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine[.]" (Italics added.)

Finally, appellant argues that the instruction omitted the requirement that defendant personally intended *to sell* the contraband. Defendant has failed to consider the entirety of the instructions. CALCRIM No. 416 expressly referred the jurors to other instructions on the particular crimes charged, as follows: "To decide whether the defendant and the other alleged member of the conspiracy intended to commit transportation of methamphetamine for sale and possession for sale of methamphetamine, please refer to the separate instructions that I will give you on one or more of those crimes." The court immediately proceeded to instruct on the separate counts, stating that, for both counts, the People were required to prove that appellant intended to sell the methamphetamine. Specifically, on transportation for sale, the court stated as one of its elements: "When the defendant transported the controlled substance, he intended to sell it[.]" And on possession for sale, the court stated as one of its elements: "When the defendant possessed the controlled substance, he intended to sell it[.]" Together, the instructions fully addressed defendant's concern. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [correctness of instructions determined from the entire charge of the court, not individual instructions].)

III. Conduct Credit

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a)). In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

The court sentenced appellant in September 2008, and calculated appellant's conduct credit in accord with the version section 4019 then in effect, which provided that

conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment is contrary to the intent of the Legislature and violates equal protection principles. We deem these contentions raised here.

As we explained in the recent case of *People v. Rodriguez* (March 1, 2010, F057533) __ Cal.App.4th __ [pp. 5-12], the 2010 amendment to section 4019 does not operate retroactively and does not violate the constitutional guarantee of equal protection of the laws. Appellant is, therefore, not entitled to additional conduct credit under that amendment.

IV. *Abstract of Judgment*

As indicated above, the court apparently imposed, and stayed pursuant to section 654, the two-year lower term on the arming enhancement accompanying the count 2 offense. The abstract of judgment, however, makes no mention of the count 2 enhancement. We will direct the trial court to prepare and file an amended abstract of judgment correcting the matter. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [courts may correct clerical error in their records at any time and appellate courts that have

assumed jurisdiction over a case may order correction of abstracts of judgment that do not accurately reflect judgment].)

DISPOSITION

The trial court is directed to prepare and file an amended abstract of judgment which indicates that the court imposed the two-year lower term on the arming enhancement accompanying appellant's conviction in count 2 of possession of methamphetamine for purposes of sale (Health & Saf. Code, § 11378) and that the court stayed execution of sentence on that enhancement pursuant to section 654. In all other respects, the judgment is affirmed.